executed transaction. Accordingly, the jurisdictions adopting the federal rule restrict the parties, on an *ultra vires* guaranty, to quasi-contractual relief.[16] In the present case justice between the parties is accomplished, since the amount of recovery in *quantum meruit* is nearly equal to that on the contract. But in many instances quasi-contractual relief is grossly inadequate.[17] Such cases emphasize the obvious fairness of the New York rule.

COMPULSORY INCORPORATION OF BANKS AND THE FOURTEENTH AMENDMENT. — It is settled that the "liberty" protected by the Fourteenth Amendment includes liberty to choose and pursue a business or occupation.[1] But it was earlier decided that the restriction placed by that Amendment upon the general legislative power reserved by the states does not extend to prohibit legislation passed by virtue of the police power.[2] Within the limits of this power liberty may be restricted.

Interesting in this connection is a recent state decision holding constitutional a state statute which requires all persons engaged in banking to incorporate within three months. There were existing statutes regulating incorporated banks, under which at least three individuals had to unite to form a corporation. *Weed* v. *Bergh*, 124 N. W. 664 (Wis.). The business of banking is not a franchise to be granted by the state on what conditions it will, but an occupation lawful at common law.[3] It is equally well recognized, however, that it is a business which the state may regulate,[4] provided that such regulation be made in discharge of some recognized governmental function.[5] Undoubtedly banking regulations to protect the depositors from fraud are unimpeachable.[6] To this end were directed some of the existing statutes in the principal case; but some went further in seeking merely to protect the depositor from the insolvency of the bank.[7] Read in the light of these existing statutes, the apparent intent of the statute in question was to make all engaged in the business of banking subject to these regulations. The fact that banks deal in their own credit, the widespread evil results of a bank failure, and the inability of the depositors to guard against loss, are considerations sufficient to show that regulation to insure the financial stability of banks is a legitimate governmental function.[8]

Not only must the end of the legislation be legitimate, but the means adopted by it must bear some intimate relation to that end. There cannot, for instance, be prohibition of a lawful business under the guise of regula-

[16] Humboldt Mining Co. *v.* American Mfg., etc. Co., 62 Fed. 356; Norton *v.* Derby National Bank, 61 N. H. 589. See Penn. R. R. Co. *v.* St. Louis, etc. R. R. Co., *supra*.

[17] Pullman's Palace Car Co. *v.* Central Transportation Co., *supra*. *Cf.* Bissel *v.* Michigan Southern, etc. R. R. Co., 22 N. Y. 258. See 14 HARV. L. REV. 339.

[1] Allgeyer *v.* Louisiana, 165 U. S. 578. For an argument that the correct meaning is freedom from physical restraint see 4 HARV. L. REV. 365.

[2] Butchers' Union, etc. Co. *v.* Crescent City, etc. Co., 111 U. S. 746.

[3] Nance *v.* Hemphill, 1 Ala. 551.

[4] Meadowcroft *v.* People, 163 Ill. 56.

[5] *Cf.* Missouri Pacific Ry. Co. *v.* Nebraska, 164 U. S. 403.

[6] Baker *v.* State, 54 Wis. 368; Meadowcroft *v.* People, *supra*.

[7] SANBORN'S STAT. SUPP. (Wis., 1906), §§ 2024–6 to 2024–55.

[8] Blaker *v.* Hood, 53 Kan. 499; State *v.* Richcreek, 167 Ind. 217. See FREUND, POLICE POWER, § 400. *Cf.* Brady *v.* Mattern, 125 Ia. 158.

tion.[9] On the other hand, any regulation is in effect prohibition of all ways of doing business except those in accordance with the regulations. But if the regulation is proper, no one has a right to do business except in accordance therewith.[10]

To require those without the purview of existing laws to come within it is obviously not the only way to control the outsiders; for the very circumstances which would validate compulsory incorporation authorize the regulation of partnerships and individuals, by extending the scope of the existing laws [11] to include them. Moreover, compulsory incorporation under the existing laws is open to the serious objection that it prohibits banking by individuals or by firms of two. The principal case, however, points out two dangers of private banking, to eliminate which would require more than an extension of the existing regulations: the subjection of the deposits to claims of the individual banker's outside creditors, and the possible interruption of business on his death. Doubtless these dangers could be prevented by some form of additional regulation which would not have the effect of prohibiting private banking. But in view of the ease with which an individual can obtain two associates for the purpose of incorporation, while himself retaining full control of the business, the restriction would seem to be theoretical rather than actual. It is therefore submitted that the principal case is correct [12] in not regarding compulsory incorporation as such an unreasonable means of regulation as to be unconstitutional.[13]

LICENSE AND WAIVER OF BREACH OF CONDITION IN LEASES. — A landlord may release his right of entry for a breach of condition by assent to the breach either prior or subsequent thereto; *i. e.*, by license or waiver.[1] The effect of this assent on the right to enter for subsequent breaches has long been a mooted question. Purporting to follow the cases which held that a condition could not be apportioned,[2] *Dumpor's Case*[3] decided in 1603 that a license to assign "to any person or persons, *quibuscunque*," destroyed a condition against assignment, so that an assignee could assign without license. Although this decision might well have been confined to licenses to assign to "any person," it was not so restricted; and the next case to consider the question held that a condition against assignment was

[9] Smyth *v.* Ames, 169 U. S. 466.

[10] Dent *v.* West Virginia, 129 U. S. 114. Thus it has been held unobjectionable to require all bankers to submit to inspection (Blaker *v.* Hood, *supra*); to make it criminal for a banker to receive a deposit after knowledge of insolvency (Meadowcroft *v.* People, *supra*); to require a minimum amount of capital to be invested in certain ways; to restrict the use of the word "bank" to those who comply with certain conditions (State *v.* Richcreek, *supra*).

[11] See FREUND, POLICE POWER, § 364.

[12] State *ex rel.* Goodsill *v.* Woodmansee, 1 N. D. 246, *acc.* *Contra*, State *v.* Scougal, 3 S. D. 55. *Cf.* Commonwealth *v.* Vrooman, 164 Pa. St. 306; Commonwealth *v.* Carter, 132 Mass. 12.

[13] But *cf.* 23 HARV. L. REV. 292.

[1] Weisbrod *v.* Dembosky, 25 N. Y. Misc. 485; Goodright d. Walter *v.* Davids, Cowp. 803. See Pennant's Case, 3 Co. 64 *a*.

[2] Leeds *v.* Crompton, 1 Rol. Abr. 472, Pl. 7; Winter's Case, Dy. 308 *b*; Anon., Dy. 152, pl. 7. See Wright *v.* Burroughes, 3 C. B. 685, 699.

[3] 4 Co. 119 *b*; s. c. Cro. Eliz. 815.